

Upper Clark Fork River Basin Steering Committee
Meeting Summary
January 14, 2009

Introductions

Gerald Mueller, members of the Upper Clark Fork River Basin Steering Committee (Steering Committee), and others in attendance introduced themselves. Those in attendance included:

Members	Group/Organization Represented
Marci Sheehan	Atlantic Richfield
Jim Quigley	Little Blackfoot River
Jim Dinsmore	Granite Conservation District
Carol Fox	Natural Resources Damage Program
Mike McLane	Montana Department of Fish, Wildlife and Parks (DFWP)
Bob Benson	Clark Fork Coalition
Holly Franz	PPL Montana

Agency Personnel

Ann Schwend	Montana Department of Natural Resources and Conservation (DNRC)
Colleen Coyle	Montana Water Court

Staff

Gerald Mueller	Facilitator
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Agenda

- Review summary of the October 31, 2008 Meeting
- Updates
 - Contract with UM Department of Geography
 - Steering Committee funding
 - Milltown Dam water rights
 - 2009 water legislation
 - Clark Fork Superfund Road Map
- Integration of Water Right Decrees
- Water Commissioner Interviews
- Public Comment
- Next Meeting

October 31, 2008, 2008 Meeting Summary

The Steering Committee made no changes to the meeting summary.

Updates

Basin Domestic Water Supply - Gerald Mueller reported that the contract between DRNC and the University of Montana Department of Geography was signed in late October 2008. The purpose of the contract is to fund a study that will document the current status of water rights for municipal use in the upper Clark Fork River basin. Jacob Petersen-Perlman, a UM geography graduate student, is conducting the study under the supervision of Dr. David Shively. Mr. Perlman has compiled the

databases of water rights for each of the sub-basins of the upper Clark Fork River basin and identified the rights related to municipal water use. He is beginning to contact municipal water operators so that he can interview them.

Steering Committee Funding - Mr. Mueller presented testimony yesterday to the Joint Appropriation Subcommittee on Natural Resources and Transportation requesting that \$16,000 per year to included in DNRC's budget to support the Steering Committee and \$37,500 be included for the Clark Fork River Basin Task Force for the 2010-2011 biennium. Mr. Mueller had sought comments on a draft of the testimony with each of the Steering Committee members prior to his testimony. Granite County Commissioner Maureen Connor, Brianna Randall of the Clark Fork Coalition, and Senator Verdell Jackson also testified in favor of the Steering Committee funding. No one testified in opposition to the funding. Subsequent to the hearing, the DRNC determined that \$16,996 had been included for the Steering Committee in its base budget supported by the general fund. The Subcommittee will likely take action by the end of this week. Mr. Mueller reported that the feedback he has received from the Subcommittee chair about the funding for the two groups is positive.

Milltown Dam Water Rights - Carol Fox reported that Governor Schweitzer has approved the grant funding of \$586,200 needed to acquire Northwestern Corporation's (NWC's) Milltown lands. Northwestern is the parent company of NorthWestern Energy. The water rights will be transferred with the lands, but the transfer has not yet occurred. The appraised value of the land was \$1.6 million. A value was not set on the water rights. This land and water right transfer coupled with NWC's payment to the state of the proceeds of an insurance policy discharges its \$3.9 million obligation under the Milltown Consent Decree for the State's restoration activities at the Milltown site. No decision has been made about which state agency will own the land and water rights. The process necessary to change the water rights because of the ownership transfer will not be initiated for some time.

Question - Have all of the liability issues been addressed?

Answer - No, these issues are being addressed as the ownership transfer is being finalized.

Question - Did the acquisition of the water rights for the subdivision at Turah set a precedent for the value of water rights?

Answer by Mike McLane - It is the value of one water right transaction. There have not been many others, so we can't say what the "market price" of a water right is. I am often called asking what the market value of water rights is. I answer whatever someone is willing to pay.

Clark Fork Superfund Restoration Road Map - At the Committee member's request, Carol Fox provided on the Natural Resource Damage Program's (NRDP) road map proposal. This draft proposal outlines a conceptual framework for how the UCFRB Restoration Fund would be prioritized via funding allocations and a prioritization process after settlement of the natural resource damage litigation. It was the subject of public comment between June and September 2008. In December 2008, the NRDP proposed changes to the draft proposal based on public comment and the Governor's request to staff and the UCFRB Remediation and Restoration Education Advisory Council (Advisory Council) to work out a consensus proposal by early 2009. The proposed changes involved increasing the contingency fund allocation by 5%, deferring the

decision on allocating leftover Silver Bow Creek remediation funds until major remedy construction is complete in 2012, and increasing the earmark for the Silver Bow Creek Greenway project from \$3.5 million to \$6 million. On January 5, 2009, the Advisory Council considered the staff's revised proposal and voted by majority to recommend the proposed increases in contingency and Greenway project funds. With regards to the leftover Silver Bow Creek funds, the Council opted not to support proposals to earmark those funds to projects confined to the Silver Bow Creek watershed or to defer the decision about these allocating funds. Instead, they voted by majority to recommend allocating any leftover Silver Bow Creek remediation funds for priority resource and grant projects throughout the UCFRB as originally proposed by staff. There is \$15 million for natural resource damage grants to be awarded this year.

2009 Water Legislation

Ann Schwend passed out the list of bills that is being tracked by the Water Resources Division. Holly Franz, Mr. Mueller, Ann Schwend, and others discussed the following bills.

- HB39 - This bill was introduced at the request of the Water Policy Interim Committee (WTIC). It makes three changes. It would authorize a district court judge to appoint a water master to help resolve water enforcement disputes. It authorized the Montana Attorney General to take enforcement actions through a new enforcement division. The bill does not specify how the AG would become involved. The bill also deletes the requirement that voluntary enforcement be sought before taking action in district court regarding enforcement.
- HB40 - This bill is also a (WPIC) bill. It incorporates the changes sought by DNRC to the water permitting process, including directing the department to issue its findings on criteria compliance up front rather than at the end of the process. John Tubbs discussed the changes at the October 31, 2008 Steering Committee meeting. HB40 is the Water Resources Division's highest legislative priority.
- HB 41 - This is a WPIC bill that would require that a discharge permit must be obtained to assure compliance with water quality standards, if necessary, for an aquifer recharge plan or a mitigation plan in a closed basin.
- HB 52 - This is another WPIC bill that would provide \$4.2 million to the Montana Bureau of Mines and Geology (MBMG) for conducting ground water studies in seven subbasins experiencing rapid growth. MBMG will develop a hydrologic model for each area.
- HB 201 - This bill was requested by Senator Jackson and will be sponsored by Representative Taylor. It would fund the Task Force at \$37,500 per year for the next biennium. This bill will be amended to include \$16,000 for the Steering Committee as a backup in case funds are not included in the DNRC budget by the Appropriation Committee. SB 4 - This bill was requested by the Environmental Quality Council (EQC) and would create a committee of the EQC to address water policy issues. This bill was tabled by the Senate Natural Resources Committee in favor of SB 22.
- SB 17 - This bill is a WPIC that would, among other things, require a public water and sewer system for subdivisions with 30 or more lots with an average lot size of less than 3 acres.
- SB 22 - This bill was introduced at the request of WPIC and would create a permanent, independent legislative committee to address water policy issues.
- SB 39 - This bill was introduced at the request of the Confederated Salish and Kootenai Tribes. It would extend the life of the Reserved Water Rights Compact Commission by four years. It was passed by the Senate and transmitted to the House.

- SB93 - This bill was introduced at the request of DNRC. For ground water appropriation in closed basin, it would require mitigation for net depletion to surface water rather than for an adverse affect on an existing water right.
- SB94 - This bill was introduced at the request of DNRC and is a companion bill to SB93. It would conform the procedural requirements for ground water appropriation in closed basin to the policy change of requiring mitigation for net depletions rather than adverse affects.
- SB120 - This bill was introduced at the request of DNRC. It would revise controlled ground water laws by changing the trigger for the study of new controlled ground water area to come from a state or local public health agency or a municipality, county, conservation district, or local water quality district. It would also authorize DNRC to form a controlled ground water area by rulemaking.
- SB149 - This bill was also introduced at the request of DNRC. It would allow a municipality or a county water and sewer district to change the place of use of a water appropriation right without prior approval to conform to its municipal water service area under certain conditions, including no expansion of the municipal water right.

Question - In HB52, who would decide what locations MBMG would study?

Answer - The areas studied would be prioritized by a ground water assessment steering committee consisting of representatives of federal, state, and local government agencies and agricultural water users, industrial water users, a conservation or ecological protection organization, and the development community.

Comment - The Realtors apparently do not support HB40. They have their own bill, LC 1396, which has not yet been introduced.

Question - Have any legislative proposals addressed designating judges whose sole duty would be addressing water controversies?

Answer - No. The WPIC briefly discussed making structural changes to how water law is enforced. One idea was to make water commissioners state employees. However, WPIC rejected all proposals except for what became HB39.

Integration of Water Right Decrees

Colleen Coyle, and Senior Water Master with the Montana Water Court, discussed this topic using the handouts contained in Appendix 1.

Question - Are enforceable decrees based on statement of claims?

Answer - Temporary or temporary preliminary decrees are enforceable after all filed objections are addressed. If no objections are filed, then the Court includes the claims in the enforcement tabulations as they were claimed. All issue remarks are not addressed prior to issuing the enforceable decree.

Question - After the enforceable decrees are implementation, what happens if errors such as wrong headgate locations are discovered.

Answer - Motions to amend claims can be filed until final decree pursuant to section 85-2-233(6). MCA. Persons filing a motion to amend must present evidence that the proposed amendment is

supported by the historical, pre-1973 use of the water right. Clerical errors can be corrected any time. If the errors occur due to post-July 1, 1973 activities (for example, the headgate was moved to a new location in 1985), water users can pursue a change authorization from DNRC.

Question - I notice in the information about some of the water rights in your Careless Creek handout that the period of use is listed as January 1 through December 31. Isn't period of use for irrigation rights normally limited to the irrigation season?

Answer - If no objection was made to the claimed period of use, and no DNRC issue remark exists on the claim, the water right will remain as claimed. Also, the period of diversion and the period of use may not be the same for stored rights. With newer basins, an irrigation claim with year-round period of use would be likely to receive an issue remark.

Question - The oldest water rights are normally in the lower portions of a basin near the stream mouth. Historically, water rights in lower and upper portions of a basin have often been subject to separate decrees. Won't the adjudication integrate the decrees in a given basin?

Answer - The historical District Court decrees in a given basin will be integrated in the Water Court decree. The area in which enforcement occurs need not be the entire Water Court decree or integrated area. It will be determined by the district judge in response to the petition filed by water right holders for a commissioner. A district court judge can assume jurisdiction outside his or her district if the stream to be enforced crosses multiple judicial districts.

Question - Does the 15% requirement for water commissioner petitions refer to 15% of the water right holders or 15% of the volume of the water rights?

Answer - The statute (85-5-101, MCA) states that the owners of 15% of the water rights affected by the decree sign the petition. We often advise people to obtain the signatures of 15% of the individual owners, 15% of the claims, and 15% of the volume of water in order to be certain that the requirement is met. The statutory language has not been litigated as far as I know at this point. However, the statute states that the district court judge has discretion to appoint a commissioner if less than 15% sign, if the water users make a showing that they are unable to obtain their water..

Question - How is the notice requirement for water right change applications defined?

Answer - The Court normally casts a broad net for the notice requirement. The area that must be noticed is determined on a case-by-case basis by potential adverse affect. Notice must be provided through newspapers of general circulation. We have discretion to also require mailings to the individual water right holders that might be adversely affected.

Question - How are the number of cows for a given stock water right determined?

Answer - DNRC sets the flow rate for a stock water right in the claims examination. It uses 30 gallons per day per animal unit. Livestock can drink directly from a stream; a diversion is not required for a stock water right. Commissioners are generally not enforcing instream stock rights at this time, although it has happened.

Question - Has the amendment process been used to circumvent the late claims issue?

Answer - This has been raised in one case that I am aware of. I will send you the documents.

Comment - Even with completion of the adjudication enforceability is being lost. Do you see a change regarding enforcement?

Response - Voluntary action to make decrees enforceable is causing change. It is allowing problems in decrees to be fixed now.

Question - Has the Water Court identified people to serve as water commissioners when decrees are made enforceable?

Answer - In some areas, water users have advertised in the newspapers for commissioners. This happens each year in the Musselshell. In other areas, the water users identify the person to serve as commissioners. Water masters occasionally make suggestions to assist water users in finding a water commissioner. For example, if a commissioner exists on a nearby stream, the water users may want to ask that person to administer their stream also.

Comment by Ms. Coyle - The Water Court is willing to hold meetings in Flint Creek to discuss making Flint Creek decrees enforceable.

Response by Jim Dinsmore - We have two old decrees in Flint Creek. One is sometimes enforced using a water commissioner. The other has not had a commissioner. I am not sure what the views of the Flint Creek water users would be regarding your offer.

Water Commissioner Interviews

Mr. Mueller passed out copies of his memorandum about his interviews of Randy Hawkins regarding Nevada Creek water management and of Dan Kelley and Ted Beck regarding Dempsey and Racetrack Creek management. See Appendix 2 for the memorandum and the summaries of the interviews. Mr. Mueller stated that the water administration on these three creeks generally works well and that the most important reason for this fact is the relative lack of turnover of water users and settled local water rights. He proposed interviewing water commissioners working in areas with more change. Mike McLane suggested visiting with the water commissioner on ten mile creek outside of Helena because this area has changed to an urban-rural mix. Jim Dinsmore said that he would get a name of someone who has administered water in Flint Creek. The water users in this area have had difficulty finding a person to serve as the commissioner.

Public Comment

Comment - The Steering Committee should consider supporting HB52 which would appropriate additional funds to MBMG for ground water studies. I am interested in a study that would address the potential affects of the proposed Rock Creek mine on the lower Clark Fork River.

Next Meeting

The next meeting was scheduled for Thursday, February 26, 2009 in Helena. The agenda will include:

- An update on 2009 water legislation;
- Discussion of the additional water commissioner interviews;
- A report on the domestic water supply situation in the upper Clark Fork pursuant to the contract between the UM Department of Geography and DNRC;

- A presentation by someone from the Montana Department of Revenue about two topics - removal of navigable lands from the property tax roles and the assessment of agricultural lands based on productivity; and
- DNRC's consumptive use methodology and its possible nexus with property tax assessments.

Appendix 1
Water Right Decree Enforcement in Montana

Upper Clark Fork Steering Committee

January 14, 2009, Helena, Montana

Colleen Coyle, Senior Water Master

Montana Water Court

800-624-3270

406-586-4364

ccoyle@mt.gov

I. Montana Water Law Overview -Four Basic Principles Governing Adjudication, Enforcement and Distribution

- Prior Appropriation Doctrine - “first in time is first in right”
- Water may not be wasted
- Use it or lose it
- Water users can't change the use of water if that change adversely affects another water user

II. District Court Enforcement of Water Rights in Montana

- Prior to 1973, no central recording system existed
- Water rights could be obtained by beneficial use, notice of appropriation, or District Court decree
- District Courts enforced water right decrees through statutory process to appoint a water commissioner
- Montana Water Court oversees statewide adjudication of existing (pre-July 1, 1973) water rights
- District Courts now enforce both historical District Court decrees and Montana Water Court decrees once available
- DNRC issues post 1973 water right permits and change authorizations for pre-July 1, 1973 rights. District Court water commissioners have jurisdiction over these changes and permits, and they are incorporated into Montana Water Court tabulations for enforcement.

III. The Montana Reserved Water Right Compact Commission .

Negotiates Federal and Indian Reserved Water Rights. Compacts are incorporated into Montana Water Court decrees, and any reserved rights that are not compacted will be filed and addressed in the general stream adjudication

IV. Differences in enforcing historical District Court decrees and Water Court decrees

District Court decrees:

- May not have included all users on the stream at that time, and do not include use rights or subsequent junior rights
- Many decrees were issued in the late 1800s and early 1900s, so ownership changes are difficult to track
- Language is sometimes difficult to interpret and administer

Montana Water Court tabulations:

- Are the product of years of adjudication work, examination by DNRC and hearings and objections at the Water Court
- Include water rights based on historical District Court decrees, plus use rights, filed rights, permits and changes, with current ownership
- DNRC maps all headgates and pump sites
- Tabulations are organized by priority date, ownership, and diversion site

V. Decree Integration for Enforcement

- Water users were required to file statements of claim for rights based on prior decrees
- Montana Water Court tabulations include claims based on prior District Court decrees, as well as use rights, filed rights, reservations and permits
- Pursuant to the prior appropriation doctrine, rights are distributed by priority date, not historical basis or purpose
- Issues related to distribution in prior decrees (even those outside of the water right elements reflected on abstracts) can be incorporated on water right abstracts through remarks, and can be included on tabulations for distribution

VI. How are water right decrees enforced?

Through District Court appointment of a water commissioner, who:

- Sets priority date limits for water use
- Monitors headgates and pump sites to ensure compliance
- Keeps records of water use and issues reports to District Court.

VII. Procedure to Begin Enforcement of Water Right Decrees

- Process begins with a petition filed with District Court by owners of 15% of the water rights affected by the decree. Section 85-5-101, MCA
- If the water users can't obtain 15%, District Court may use discretion to appoint a commissioner

VIII. Water Commissioners' Duties and Responsibilities

- Keep daily records of water distribution
- Have authority to enter upon any ditch, canal or other source and to visit, inspect and adjust headgates.
- Have arrest authority, use of which is discouraged
- Are required to maintain worker's compensation
- Bill all costs and compensation to water users based on proportion of water distributed
- Duty of commissioner is to distribute water pursuant to the provisions of the decree, permit, certificate or change
- Failure to perform duty is contempt of court. Section 85-5-109, MCA

IX. Water Users' Duties and Remedies

- Water users who fail to comply with orders of court and water commissioner may be held in

contempt of court

- Water users who are dissatisfied with the distribution by the water commissioner may file a petition with the District Court Judge, and the Judge may substitute the commissioner, issue instructions to the commissioner, or find the commissioner in contempt of court.
- Water users must install headgates and measuring devices for ditches on streams where commissioners are appointed. Section 85-5-302, MCA

IX. Training for Water Commissioners

- DNRC provides excellent water measurement training every spring, provides one-on-one technical training with commissioners when needed, and has many resources available for commissioners and water users
- Montana Water Court provides mediation training for water commissioners, assists and trains commissioners using Water Court decrees on use of tabulations, and is available to commissioners and District Courts for questions on Montana water law and water distribution

X. Enforcement of Water Use Act Violations

Water Commissioners are typically appointed to distribute surface water on streams and rivers during irrigation season, although they could be appointed to distribute any type of water right, including groundwater, under Montana Water Court tabulations including DNRC permits, certificates and change authorizations

- Jurisdiction of commissioner typically ends at headgate or pump site on stream
- Also have ditch riders on some ditches and canals
- Illegal ponds have become an issue in Montana, often outside areas where commissioners are appointed

Water users have other options for enforcement, including:

- Filing a complaint at DNRC requesting the agency to pursue voluntary compliance
- Making a call directly on junior users
- Litigation such as TRO and preliminary injunction
- County Attorneys can prosecute violations of the Montana Water Use Act

2008 Priority Date Index - Careless Creek Enforcement Area

Enforceable Priority Date	Water Right #	Owner	Type	Use	Acres	Pod ID	Means	Qtr Sec	Section	Twp Rge	Source	Enf #	Diversion Name	From - To	Cfs	Total Flow
18810611	40A W 198145 00	CARELESS CREEK RANCH CO	DECR	IR	536	1	HG	SENE	6	9N18E	CARELESS CREEK	21	BANCORD (MIDDLE) FLOOD DITCHES	01 01 12 31	1.25	1.25
18810617	40A W 204391 00	SWANZ RANCH, LP	USE	ST		1*	LS	S2SE	28	11N18E	LITTLE CARELESS CREEK	UTLLS0 01	UTLLS001	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		2*	LS	W2NE	33	11N18E	LITTLE CARELESS CREEK	LLS007	LLS007	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		3*	LS	E2E2	4	10N18E	LITTLE CARELESS CREEK	LLS004	LLS004	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		4*	LS	NE	9	10N18E	LITTLE CARELESS CREEK	LLS003	LLS003	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		5*	LS	S2	9	10N18E	LITTLE CARELESS CREEK	LLS002	LLS002	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		6*	LS	NWNW	16	10N18E	LITTLE CARELESS CREEK	LLS001	LLS001	01 01 12 31		1.25
18810617	40A W 204396 00	SWANZ RANCH, LP	USE	ST		1*	LS	S2	13	11N18E	CARELESS CREEK	LS043	LS043	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		2*	LS	E2E2	26	11N18E	CARELESS CREEK	LS040	LS040	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		3*	LS	W2W2	25	11N18E	CARELESS CREEK	LS041	LS041	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		4*	LS	W2NW	36	11N18E	CARELESS CREEK	LS038	LS038	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		5*	LS	SWSE	2	10N18E	CARELESS CREEK	LS036	LS036	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		6*	LS	E2NW	11	10N18E	CARELESS CREEK	LS035	LS035	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		7*	LS	SE	16	10N18E	CARELESS CREEK	LS033	LS033	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		8*	LS	NW	21	10N18E	CARELESS CREEK	LS031	LS031	01 01 12 31		1.25
18810617		SWANZ RANCH, LP	USE	ST		9*	LS	W2	24	11N18E	CARELESS CREEK	LS042	LS042	01 01 12 31		1.25
18810617	40A W 205221 00	SWANZ RANCH, LP	DECR	IR	530	1*	HG	SWNESW	2	10N18E	CARELESS CREEK	28	NELSON AND POUND (LOWER) FLOOD DITCH	04 15 10 19	5.00	6.25

Wednesday, April 30, 2008
* Indicates multiple Points of Diversion

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2008 Owner Index - Careless Creek Enforcement Area

Owner	Enforceable Priority Date	Water Right #	Type	Use	Acres	Pod ID	Means	Qtr Sec	Section	Twp Rge	Source	Enf #	Diversion Name	From - To	Cfs
ALPINE LIVESTOCK CO INC	19001231	40A W 184519 00	USE	IR	90	1	HG	NWNE	31	8N18E	CARELESS CREEK	05	JOHN PIRRIE DITCH	02 01 12 04	2.23
BERG, LARRY D	19050801	40A W 205962 00	DECR	IR	185	1	HG	SEWNE	29	10N18E	CARELESS CREEK	23	DEBUFF FLOOD DITCH	03 01 11 30	5.00
BERG, ROXANNE	19050801	40A W 205962 00	DECR	IR	185	1	HG	SEWNE	29	10N18E	CARELESS CREEK	23	DEBUFF FLOOD DITCH	03 01 11 30	5.00
CARELESS CREEK RANCH CO	18810611	40A W 198145 00	DECR	IR	536	1	HG	SENE	6	9N18E	CARELESS CREEK	21	BANCORD (MIDDLE) FLOOD DITCHES	01 01 12 31	1.25
CARELESS CREEK RANCH CO	18820215	40A W 198138 00	DECR	IR	536	1	HG	SENE	6	9N18E	CARELESS CREEK	21	BANCORD (MIDDLE) FLOOD DITCHES	01 01 12 31	5.00
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		1*	LS	SW	29	10N18E	CARELESS CREEK	LS030	LS030	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		2*	LS	S2	31	10N18E	CARELESS CREEK	LS029	LS029	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		3*	LS	E2	6	9N18E	CARELESS CREEK	LS028	LS028	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		4*	LS	E2	7	9N18E	CARELESS CREEK	LS027	LS027	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		5*	LS	E2	18	9N18E	CARELESS CREEK	LS026	LS026	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		6*	LS	W2	20	9N18E	CARELESS CREEK	LS025	LS025	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		7*	LS	W2	29	9N18E	CARELESS CREEK	LS024	LS024	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		8*	LS	W2	32	9N18E	CARELESS CREEK	LS024	LS024	01 01 12 31	
CARELESS CREEK RANCH CO	18820401	40A W 198110 00	USE	ST		9*	LS	E2	31	9N18E	CARELESS CREEK	LS023	LS023	01 01 12 31	
CARELESS CREEK RANCH CO	18820612	40A W 198131 00	DECR	IR	593	1	HG	NWNNE	6	9N18E	LITTLE CARELESS CREEK	L001	BANCORD (MIDDLE NO. 2) FLOOD DITCHES	01 01 12 31	4.00
CARELESS CREEK RANCH CO	18830605	40A W 139989 00	DECR	IR	316	1*	HG	SESE	8	8N18E	CARELESS CREEK	10	LAMMERS (MIDDLE) FLOOD DITCHES	01 01 12 31	2.50
CARELESS CREEK RANCH CO	18830605	40A W 139989 00	DECR	IR	316	2*	HG	SESE	8	8N18E	CARELESS CREEK	09	LAMMERS (MIDDLE) FLOOD DITCHES	01 01 12 31	2.50
CARELESS CREEK RANCH CO	18831231	40A W 198072 00	USE	ST		1*	LS	E2	5	8N18E	CARELESS CREEK	LS022	LS022	01 01 12 31	

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Wednesday, April 30, 2008
* Indicates multiple Points of Diversion

COMMISSIONER REPORT

Based on As Modified Temporary Preliminary Decree

<i>Enforcement No.</i>	<i>Diversion Name</i>	<i>Legal Description</i>	<i>Source</i>
12	LAMMERS (UPPER) FLOOD DITCHES	NWSESE 5 8N18E	CARELESS CREEK

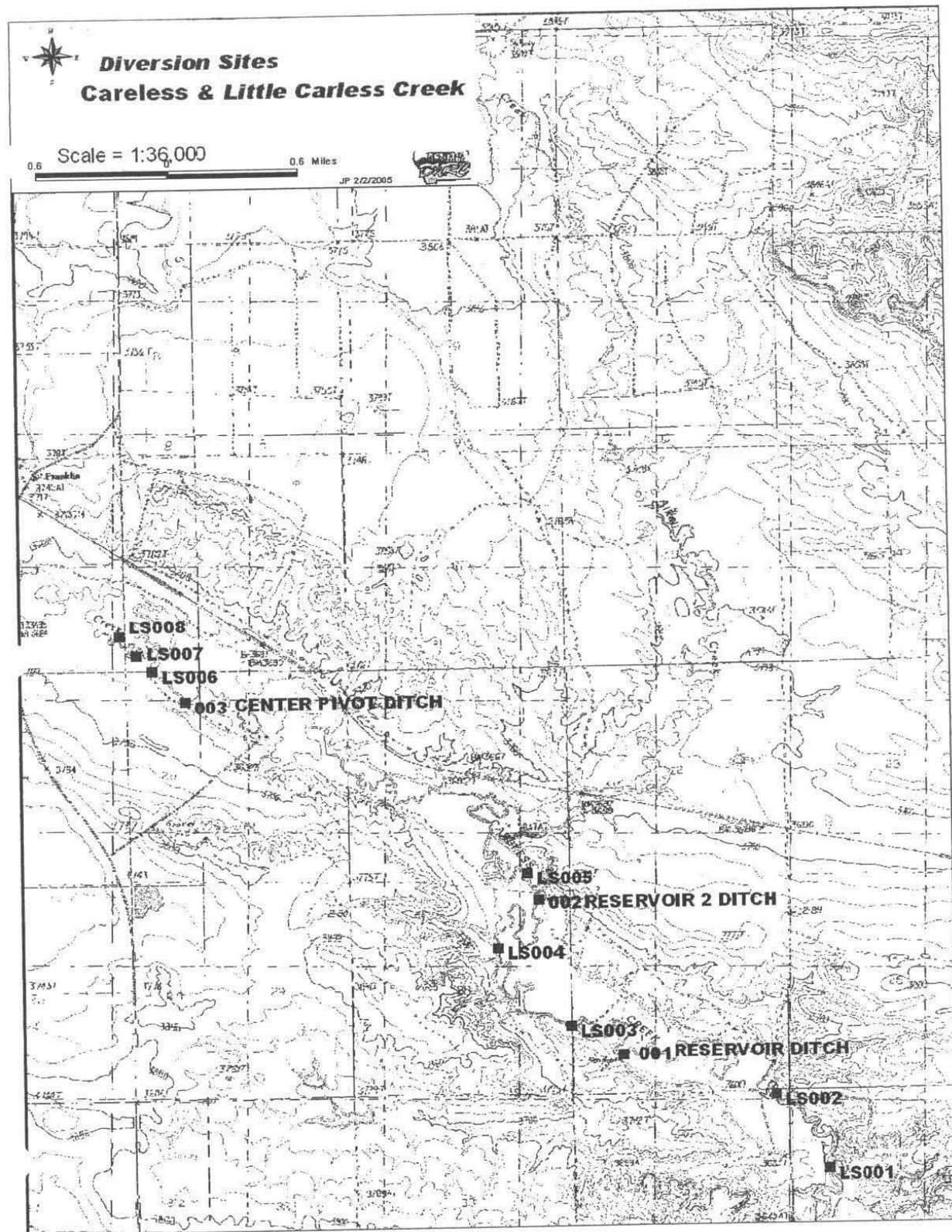
<i>Enforceable Priority Date</i>	<i>Owner</i>	<i>Water Right #</i>	<i>Type</i>	<i>Use</i>	<i>Acres</i>	<i>Pod ID</i>	<i>Means</i>	<i>From - To</i>	<i>Cfs</i>	<i>Comments</i>
19820803	CARELESS CREEK RANCH CO	40A P 50641 00		IR	183.5	1	DT	01 01 12 31	10	FILLS STORAGE OFFSTREAM RESERVOIR, IRRIGATES FROM RESERVOIR

Cfs Total For Diversion 10

Wednesday, April 30, 2008

* Indicates multiple Points of Diversion

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Appendix 2
Upper Clark Fork River Basin Steering Committee
C/O Gerald Mueller
440 Evans
Missoula, MT 59801
(406)543-0026

MEMORANDUM

Date: January 10, 2009
To: Steering Committee Members
From: Gerald Mueller
RE: Water Administration Interviews

During December 2008, I interviewed Randy Hawkins regarding Nevada Creek water management and Dan Kelley and Ted Beck regarding Dempsey and Racetrack Creek management. Copies of my summary of their interviews is attached. My summaries were reviewed by Mr. Hawkins and Mr. Beck to ensure their accuracy.

Key Points for the Interviews

The water administration on these three creeks generally works well for several reasons. The most important are the relative lack of turnover of water users and settled local water rights. The users generally know each other and accept the application of existing decrees to regulate water use. On Nevada Creek the availability of stored water has made water administration easier. The users on all three creeks routinely petition the local district judge for a water commissioner when water is short. Headgates and measuring devices are common on all three creeks. DNCR water commissioner training has also been useful to water managers on the three creeks.

Problems with administration have been rare. On Nevada Creek, a new user denied the commissioner access, but this issue was resolved by the district judge. On Dempsey Creek a couple of neighbors have trouble getting along, but water administration issues have been addressed by the commissioner.

Finding a commissioner has not been difficult. The commissioners have been chosen by the water user groups and recommended to the district judge. For Dempsey and Racetrack Creeks, the water users on occasion have advertised for a commissioner with the Job Service. On Nevada Creek, the commissioner has also been the ditch rider, the person charged with allocating water stored in Nevada Creek Reservoir.

The district judge for all three of these creeks was Judge Meisner, who recently retired. The new district judge does not have the experience with water right issues of his predecessor. The Dempsey and Racetrack water users are concerned that the new judge may follow legal procedures more strictly than his predecessor so that the users will have to hire attorneys to handle water right issues with him. This will make water right controversies increasingly expensive to

resolve.

Randy Hawkins
December 3, 2008

1. What is the basis for your administration of water, a water rights decree or some other agreement or document?

Decreed water is administered pursuant to the Nevada Creek Decree issued by Montana District Court Judge Winston in 1909. Water stored in Nevada Creek Reservoir is administered pursuant to contracts with the Nevada Creek Water Users Association. Water right claims filed in the adjudication are not used to administer water.

2. Which specific decree or other agreement or document do you use?

Decreed water is administered from a table of rights compiled from the actual court decree. Mr. Hawkins has also requested that each water right holder list his or her water rights. He has compared this list with the table compiled from the 1909 decree and discussed any discrepancies with the water right holder. This process created credibility with water right holders.

3. For how long has the water in your drainage been administered in this way?

The decree has been in effect since 1909. Nevada Creek Dam was built in 1938, and the Water Users Association was formed in 1939 to manage the stored water.

4. How long have you acted as the water commissioner?

The Water Users Association hires a ditch rider to manage stored water each year. The ditch rider controls water releases from the dam and operates the two canals that distribute the stored water. Mr. Hawkins was hired by the Water Users to be the ditch rider in 1997.

In water short years, decreed users petition district court for a water commissioner. The commissioner and ditch rider has generally been the same person.

5. How did you come to play this role? How was commissioner selected?

From 1974 to 1997, Mr. Hawkins was an irrigator working for Burt Mannix, chairman of the board of directors for the Nevada Creek Water Users Association (Water Users) and the liaison between the Water Users and the decreed water rights holders. When the ditch rider position opened in 1997, Mr. Hawkins was hired to fill it.

6. Did the water users, the judge, or someone else first contact you about being a commissioner?

Since he acts as the ditch rider, Mr. Hawkins has also been the consensus water commissioner when it has been appointed. Mr. Hawkins was originally hired as the ditch rider because of his work for Mr. Mannix.

7. How often do you talk to the judge, and what issues do you generally discuss with the judge?

Until his recent retirement, the district court judge with jurisdiction was Judge Ted Meisner. Judge Meisner reputedly did not like water right controversies, so Mr. Hawkins opted, for the

most part, not to bother him. Mr. Hawkins contacted him once or twice at the beginning of the year.

8. Have you sought technical assistance in administering water, and if you have, from whom have you sought it?

Mr. Hawkins regularly attends the annual DNRC water commissioner training. He has regularly consulted with two DNRC staff members, Jim Beck, Civil Engineering Specialist, who works with the Nevada Creek project, and Mike Roberts, Surface Hydrologist, who conducts the water commissioner training.

9. How do carry out your work as the water commissioner?

Mr. Hawkins works with two groups of water users, those above the dam and those below. There are six users above the dam, three of whom have contracts for stored water and three that do not. Mr. Hawkins monitors the flow into and out of the dam using gauging stations located above and below it. He releases water from the dam when contract holders call for their water. Contract holders above the dam use storage by taking water above their decreed rights that would otherwise flow into it. When these users increase their withdrawals from the stream, Mr. Hawkins keeps downstream users whole by increasing releases from the dam.

10. What determines when you start administering water each year?

The balance of supply and demand determines when decreed or stored water management begins.

11. How do you determine how much water each water right receives?

Water is allocated pursuant to the contracts or the Nevada Creek Decree.

12. How do you determine when a water right is in priority?

The listing of water rights in the decree determines priority.

13. Would you please describe a typical day administering water?

The gauging station above the dam is automated, and readings are available every 15 minutes via the internet. Each morning, Mr. Hawkins averages the previous days' flow into the dam to determine the amount to be released from the dam for decreed rights. Using a computer spread sheet, he determines which water rights are in priority and sends an email to each decreed user specifying the amount of water they can use that day. For contract water users, he releases the available stored water according to calls made by the contract holders.

14. What types of measuring devices, if any, are your users required to have?

The users are required to have measuring devices, but many are old and some may not function. Below the dam, users have diversion and control structures and measuring devices. Above the dam, where the stream is not controlled and flows vary significantly by season and year, users do not all have diversion and control structures and measuring devices. Mr. Hawkins has a Marsh McBirney flow meter that he can use to measure flows in an open structure. Once he makes a measurement of a diversion, he can install a staff gauge to measure the height of the water in a stream or canal. He can then instruct the user to

maintain the staff gauge water level to a specified level determined from the flow meter measurement.

15. Do all of the users have to use the same measuring devices, or is there a variety of measuring devices?
No, three different measuring devices are used: rectangular weirs, Parshall flumes, and ramp flumes, also known as Repogle flumes, or broad crested weirs.
16. Do you have any diversions without measuring devices?
See answer to question 14.
17. Do you have any diversions without controlling facilities, such a headgate that can stop diversions when the water right is not in priority?
See answer to question 14.
18. Have you ever denied water to a user based upon the wasting of water? If so, please explain the situation.
No.
19. What challenges have you experienced in your role as a water commissioner?
The challenges relate mostly to working with people. If water users see that the ditch rider or water commissioner is doing his or her job conscientiously, then they tend to use the water pursuant to their contract or the decree.
20. Have you had conflicts with individual water users in administering water, and if you have, how did you resolve them?
On one occasion, a new user was difficult and would not allow Mr. Hawkins access to his property to regulate water unless he was present. Mr. Hawkins reported this problem to Judge Meisner, and the judge instructed the water user to contact the court if he had problems with Mr. Hawkins' actions. This resolved the problem. Because new water users have been rare on Nevada Creek and Mr. Hawkins has an established relationship with the water users, problems have been unusual. The availability of storage in the Nevada Creek reservoir also makes Mr. Hawkins' job easier.
21. Have you ever had a dissatisfied water users action filed against you, and if you have, how did you participate in the action?
No.
22. Do you foresee something that will or would make your job as a water commissioner easier or harder?
Maps, measuring devices, and doing your homework makes the job easier.
23. How will completion of the adjudication affect your actions as a water commissioner?

Completing the adjudication will resolve discrepancies that have arisen because ranches have been broken up and the new owners have claimed the same water right.

24. Are you compensated for your work as a water commissioner, and if you are, how is the compensation determined?

Mr. Hawkins is paid by the day for each day that he works. He specified the level of compensation when he is acting as a water commissioner. He sends out bills to decreed users monthly based on the percentage of the water delivered to each water right holder. He is paid at the end of the month. Because water users that do not pay their bill do not receive water until the bill is paid, Mr. Hawkins has not had a significant problem getting paid.

Compensation for Mr. Hawkins' work as the ditch rider managing stored water is set by the Water Users' board of directors.

25. Do you have any recommendations for changing the way water is administered?

No.

Dan Kelley and Ted Beck
December 10, 2008

Note: Dan Kelley addressed Dempsey Creek and Ted Beck addressed Racetrack Creek.

1. What is the basis for your administration of water, a water rights decree or some other agreement or document?
Both Dempsey and Racetrack Creeks have existing decrees.
2. Which specific decree or other agreement or document do you use?
The commissioners on the two creeks use a list of water rights in priority compiled from the two decrees.
3. For how long has the water in your drainage been administered in this way?
The two decrees have existed for many years. The earliest rights have priority dates in the 1860s. We are not sure when the water users began using a water commissioner.
4. How long have you acted as the water commissioner?
Neither Mr. Kelley nor Mr. Beck act as the commissioners; they have, as did their fathers before them, provided leadership in the water administration on the two creeks. Stan Fries has been the commissioner for Dempsey Creek for over 20 years, and Will Pauley has been the commissioner for Racetrack Creek.
5. How did you come to play this role? How was commissioner selected?
Judge Ted Meisner allowed the water users to handle water administration as they wished. The water users proposed a person to act as the water commissioner and the judge would select that person and swear him in as the agent of the court.
6. Did the water users, the judge, or someone else first contact you about being a commissioner?
The water users identified the person to serve as the commissioner. In some years, the water users advertised for a commissioner through the Job Service. Applicants were then interviewed by the water users. Preference is usually given for local people to act as the commissioner because they will be more available to do the work.
7. How often do you talk to the judge, and what issues do you generally discuss with the judge?
Because the water users on the two creeks have not changed very much, we have not had many problems with water allocation. The commissioner generally comes to Mr. Kelley or Mr. Beck before approaching the judge. A petition signed by water users initiates the action by the judge to appoint the commissioner.
8. Have you sought technical assistance in administering water, and if you have, from whom have you sought it?

- Our commissioners have generally attended the annual DRNC water commissioner training.
9. How do carry out your work as the water commissioner?
The commissioner allocates water pursuant to the list of water rights in priority.
 10. What determines when you start administering water each year?
The water supply determines when allocation activities begin each year. Some users begin diverting water in March for flood irrigation. Those using sprinklers may wait until May to begin.
 11. How do you determine how much water each water right receives?
Determinations are made using the list of water rights in priority.
 12. How do you determine when a water right is in priority?
The list of water rights from the decree determines the priority order.
 13. Would you please describe a typical day administering water?
Commissioners often begin their day at 6:00 a.m., and revisit diversions in the afternoon to check on allocations.
 14. What types of measuring devices, if any, are your users required to have?
Water users must have measuring devices that a commissioner can use. The devices are Parshall flumes or a flow meter.
 15. Do all of the users have to use the same measuring devices, or is there a variety of measuring devices?
See question 14.
 16. Do you have any diversions without measuring devises?
All diversions except those that function only during high water have measuring devices.
 17. Do you have any diversions without controlling facilities, such a headgate that can stop diversions when the water right is not in priority?
95% of the users have headgates. Only those that have high water rights might not. Reduction in flow cuts off the high water users.
 18. Have you ever denied a user water based upon the wasting of water? If so, please explain the situation.
We are not sure how a determination that someone is wasting water would be made. If someone is putting water on the ground, benefits through return flows will generally occur.
 19. What challenges have you experienced in your role as a water commissioner?

Things have generally worked well. However, we are concerned that new users with lots of money may come in and create legal actions that take years to resolve. Traditional agricultural users do not have enough money to fight prolonged legal battles.

20. Have you had conflicts with individual water users in administering water, and if you have, how did you resolve them?

Conflicts do not usually occur because the users are not changing. A couple of neighbors on Dempsey Creek aggravate each other and sometimes use water allocations to do so. The commissioner has been able to resolve the Dempsey Creek disputes.

21. Have you ever had a dissatisfied water users action filed against you, and if you have, how did you participate in the action?

No.

22. Do you foresee something that will or would make your job as a water commissioner easier or harder?

Judge Meisner recently retired. The new judge, Judge Ray Dayton, has a full plate and if water right disputes occur, he will apparently follow legal procedures more strictly than his predecessor. We are concerned that we will have to hire attorneys to handle water right issues with the judge. This will make water right controversies increasingly expensive to resolve. Also, the creeks run less every year. Last year the water supply on both creeks was adequate. Forest management decisions may be affecting the water supply. Many trees in the watershed have been killed by insects.

23. How will completion of the adjudication affect your actions as a water commissioner?

We are not sure. The Water Court has offered us new enforceable decrees, but we have not opted for them.

24. Are you compensated for your work as a water commissioner, and if you are, how is the compensation determined?

The commissioners are paid \$75.00 per day, a level set by the water users.

25. Do you have any recommendations for changing the way water is administered?

All users should have parshall flume measuring devises.